UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

December 11, 2017 at 10:00 a.m.

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1. 17-25004-A-11 SARINA BRYSON — MOTION TO APPROVE DISCLOSURE STATEMENT 10-11-17 [46]

Tentative Ruling: The motion will be denied without prejudice.

The debtor seeks approval of the disclosure statement filed on October 11, 2017. Dockets 45 & 46.

The motion will be denied for the following reasons:

(1) While this disclosure statement indicates the debtor is a small business debtor, the debtor's petition states that "I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code." Docket 1 at 4.

(2) The disclosure statement says nothing about the debtor's prior unsuccessful chapter 13 case. That case was dismissed on a motion by the chapter 13 trustee. The disclosure statement should be amended to disclose the prior case and explain why it was dismissed.

(3) The disclosure statement does not disclose how many members of the debtor's household are being supported by the debtor.

(4) The disclosure statement indicates that the debtor is paying $150 a month for life insurance. It also indicates that the same amount is being deducted from the debtor's salary. It is unclear whether this is the same $150 or whether the debtor incurring $300 a month for insurance.

(5) The disclosure statement indicates the debtor is incurring $350 each month for medical and dental expenses. However, it also discloses that medical insurance is being deducted from her salary. Why are additional expenses being incurred if the debtor has insurance?

(6) The disclosure statement discloses an expense of $375 a month for a "replacement vehicle," but the need for such vehicle is not explained.

(7) The disclosure statement discloses expenses of $400 a month for "Telephone, Cell phone, Internet, Cable". On its face, the $400 amount appears to be excessive for the debtor's household. The expense amount should be changed or explained.

(8) The disclosure statement provides expenses of $300 a month for "Entertainment, Clubs, Recreation, Newspapers, Magazines, and Books." On its face, the $300 amount appears to be excessive for the debtor's household. The expense amount should be changed or further explained.

(9) The disclosure statement provides an expense of $340 a month for horse food and care, without explaining why this is a reasonable and necessary expense.

2. 17-26125-A-11 FIRST CAPITAL RETAIL, L.L.C. — STATUS CONFERENCE 9-14-17 [1]

Tentative Ruling: None.

3. 17-26125-A-11 BAL-1 FIRST CAPITAL RETAIL, L.L.C. ARDEN FAIR ASSOCIATES, L.P. VS. — MOTION FOR RELIEF FROM AUTOMATIC STAY 10-23-17 [69]

Tentative Ruling: The hearing on the motion will be continued.

The movant, Arden Fair Associates, L.P, seeks relief from the automatic stay with respect to a commercial real property in Sacramento, California. The debtor has been leasing the property from the movant. The debtor failed to make pre-petition payments to the movant under the lease agreement. On or about May 11, 2017, the movant served the debtor with a 10-day notice to pay or quit. The notice declared a forfeiture of the lease. He debtor did not pay or quit the premises, allowing the notice to expire.

The movant filed and unlawful detainer action against the debtor on July 3, 2017. Judgment for possession was entered on August 10, 2017 against the debtor, terminating the lease and entitling the movant to obtain possession of the property. Docket 74, Ex. 5. A writ of possession was issued on August 29, 2017. Docket 74, Ex. 6.

The court will not permit the debtor to attack the state court's judgment here. The Rooker-Feldman doctrine precludes this court from setting aside the state court's judgment for possession. There is no "ministerial entry of judgment" exception to Rooker-Feldman.

Further, "[t]he matter of granting or denying such an application [for relief from a lease forfeiture under section 1179] is one which lies so largely in the discretion of the trial court that it would require a very clear showing of an abuse of such discretion to justify a reversal of the order made thereon."

Superior Motels, Inc. v. Rinn Motor Hotels, Inc., 195 Cal. App. 3d 1032, 1064 (1987) (quoting Mathews v. Digges, 45 Cal. App. 561, 566 (1920).

Given that state courts have nearly plenary discretion on deciding whether to grant relief from a lease forfeiture and given the movant's judgment for possession, the court will continue the hearing on this motion once again, and require the debtor to file its motion for relief from the forfeiture with the state court.

A motion for relief from the forfeiture can be brought before the state court on as little as five days notice. Cal Civ. Proc. Code § 1179. Therefore, the court will continue this hearing to January 8, 2018 at 10:00 a.m. If the debtor has not obtained relief from the forfeiture by the continued hearing date, the court is likely to grant the requested stay relief.

The debtor has no ownership interest in the property. The debtor is unable to assume the lease because its tenancy interest terminated before this case was filed upon expiration of the ten-day notice on or about May 22, 2017. See In re Windmill Farms, Inc., 841 F.2d 1467, 1470 (9th Cir. 1988); In re Smith, 105 B.R. 50, 53 (Bankr. C.D. Cal. 1989).

4. 17-26125-A-11 BAL-2 — FIRST CAPITAL RETAIL, L.L.C. — MOTION FOR ORDER ALLOWING AS AN ADMINISTRATIVE EXPENSE POST PETITION RENT AND LEASE CHARGES 10-30-17 [89]

Tentative Ruling: The motion will be granted in part.

The court continued the hearing on this motion from November 13, 2017, in order for the debtor to cure all post-petition arrears. The debtor promised to cure post-petition arrears by December 1. Docket 169 at 2.

The movant, Westfield, L.L.C., as the managing agent for the landlords of the Westfield Century City and Westfield Oakridge shopping centers, moves for an order (1) allowing as an administrative expense post-petition rent and lease charges under 11 U.S.C. §§ 365(d)(3) and 503(b); and (2) compelling the debtor's immediate payment of administrative expenses by November 17, 2017.

Westfield is the landlord and the debtor is the tenant under four unexpired leases of nonresidential real property at Westfield Century City in Los Angeles, California (Auntie Anne's and Cinnabon), and Westfield Oakridge in San Jose, California (Cinnabon and Mrs. Fields). See Docket 92, Declaration of Scott L. Grossman ("Grossman Decl.") at ¶¶ 1, 3. The debtor has failed to pay all of the post-petition rent due for the period from September 14, 2017 through October 30, 2017, approximately $83,440.62, under its four shopping center lease with Westfield. See Docket 92, Grossman Decl. at ¶ 5.

11 U.S.C. § 365 authorizes the debtor-in-possession to assume or reject executory contracts and unexpired leases. See 11 U.S.C. §§ 365, 1107(a). The trustee is required to assume or reject a nonresidential unexpired lease by the earlier of (I) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming a plan. 11 U.S.C. § 365 (d)(4)(A). Failure to assume or reject within the aforementioned time period results is automatic rejection. 11 U.S.C. § 365 (d)(4)(A).

Section § 365(d)(3) requires that the debtor in possession to "timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3). In other words, "[u]ntil the trustee assumes or rejects an unexpired lease of nonresidential real property, the trustee must perform obligations under that lease." Cukierman v. Uecker (In re Cukierman), 265 F.3d 846, 849 (9th Cir.2001).

According to section 365(d)(3), then, the debtor must pay post-petition, pre-rejection rent and lease charges to Westfield.

The Ninth Circuit has adopted a bright-line rule that all claims arising from a debtor's nonperformance of post-petition, pre-rejection lease obligations are entitled to administrative expense priority. In re TreeSource Indus., Inc., 363 F.3d 994, 997 (9th Cir. 2004)(citing Cukierman, 265 F.3d at 851). Therefore, the request that the post-petition rent be allowed as an administrative expense will be granted.

Westfield also contends that the debtor's obligations under section 365(d)(3) have priority over other administrative expenses and requests immediate payment of post-petition rent past due.

Courts are divided as to whether a section 365(d)(3) claim for post-petition rent should be paid as soon as the rent becomes due, giving that claim de facto "superpriority" over other administrative claims. The majority of courts addressing the super-priority issue, including those in the Ninth Circuit, have held that section 365 does not create any kind of super-priority in favor of a landlord and that the landlord is entitled to payment of its administrative expense claim when and to the extent that other administrative expense claimants are paid.

The Ninth Circuit Bankruptcy Appellate Panel has concluded that there is no super-priority under § 365(d)(3). In re Orvco, 95 B.R. 724 (B.A.P. 9th Cir. 1989). "In the absence of such language, we hold that after rejection of the lease, the payment of an administrative claim for rent, like all other administrative claims is within the sound discretion of the bankruptcy court and should be determined under section 503." Orvco, 95 B.R. at 728. The BAP concluded that it would not award immediate payment where the record indicated there may insufficient funds in the estate to pay all administrative claimants in full. Id. Other courts within the Ninth Circuit have followed *Orvco*. See, e.g., In re Bryant Universal Roofing, Inc., 218 B.R. 948, 953 (Bankr. D. Ariz. 1998); In re MS Freight Distribution, Inc., 172 B.R. 976, 978 (Bankr. W.D. Wash. 1994).

This court is persuaded that section 365(d)(3) claims are not entitled to super priority status warranting immediate payment. Accordingly, the court will not compel the debtor to immediately tender rent payments to Westfield for the period of September 14, 2017 through October 30, 2017.

In the alternative, Westfield requests that the court enter an order deeming the leases rejected and compelling the debtor to surrender the premises.

Subsection (d)(3) of section 365 does not expressly state what consequences follow from a debtor's violation of its terms. Subsection (d)(4) of section 365 addresses the circumstances in which a debtor's nonresidential lease is deemed rejected. It does not include any reference to a violation of subsection (d)(3). As noted by the Ninth Circuit in In re Southwest Aircraft Svcs., Inc., 831 F.2d 848, 853-54 (9th Cir. 1987) *cert. denied*, 487 U.S. 1206 (1988), "[n]othing in either subsection, in any other part of the Bankruptcy Code, or in the legislative history of that Code suggests a reading such as is suggested by the [lessor].

When a debtor-tenant of an unexpired commercial lease fails to pay post-petition rent in violation of section 365(d)(3), "bankruptcy courts . . . have the discretion to consider all of the particular facts and circumstances involved in each bankruptcy case and . . . decide whether the consequence of a violation of subsection (d)(3) should be forfeiture of the unassumed lease, some other penalty, or no penalty at all." Id. At 854.

The only circumstance presented to the court in this case is a breach of the obligation to pay rent. As in Southwest, the court concludes this is insufficient basis, without additional facts, to deem the leases rejected.

Westfield requests that its attorneys' fees and costs in the amount of $4,310.00 incurred in the preparation and prosecution of this motion be included in their section 365(d)(3) administrative claim. Section 20.09 of each of the leases contain attorney fee provisions entitling Westfield to recover fees in the event it is required to take legal action to enforce the terms of the lease specifically in the context of a bankruptcy case.

Many courts have considered the language of section 365(d)(3), and have concluded that both the legislative history of that section and the language of the section itself mandate that a lessor be paid interest, late fees, and legal fees incurred in the post-petition, pre-rejection period of the bankruptcy case, provided these amounts are obligations of the debtor under the lease. See In re MS Freight Distribution, Inc., 172 B.R. 976, 978–979 (Bankr. W.D. Wash. 1994)(citing In re Washington Bancorporation, 126 B.R. 130 (Bankr. D. D.C. 1991) (late fee of 1% per day allowed); In re Pacific Sea Farms, Inc., 134 B.R. 11 (Bankr. D. Haw. 1991) (landlord entitled to reasonable legal fees); In re Revco D.S., Inc., 109 B.R. 264 (Bankr. N.D. Ohio 1989) (lessor's attorneys fees allowed); In re Narragansett Clothing Co., 119 B.R. 388 (Bankr. D. R.I. 1990) (lessor's attorneys fees allowed).

This court, however, is unconvinced, that it was necessary for Westfield to file this motion inasmuch as it is without controversy in this circuit that the post-petition rent is an administrative expense. This motion was not necessary to establish this fact and no other relief has been granted.

The court concludes that Westfield is entitled to an administrative priority claim for post-petition, pre-assumption/rejection lease obligations under section 365(d)(3) to be paid when and to the extent that other administrative expense claimants are paid. All other relief is denied.

5.	17-26125-A-11 GEL-4	FIRST CAPITAL RETAIL, L.L.C.	MOTION TO USE CASH COLLATERAL 10-6-17 [45]

Tentative Ruling: The motion will be conditionally granted.

The court continued the hearing on this motion from November 13, 2017, in order for the debtor to file a motion for approval of DIP financing. Subject to hearing from the debtor about its DIP financing, the court is inclined to grant this motion. The ruling from November 13 is below and it otherwise remains unaltered.

First Capital Retail, L.L.C., the chapter 11 debtor, seeks approval to use the cash collateral of several creditors secured by fourteen retail franchise locations throughout California, which the debtor owns and operates. These retail franchises include Focus Brands such as Auntie Anne's, Cinnabon and Mrs. Fields. The cash collateral at issue is the income generated by the debtor’s business transactions.

The supplemental motion (Docket 82) seeks to approve use of cash collateral for the period of November 1, 2017 through December 31, 2017 for the payment of the operating expenses as set forth in the budget filed concurrently with the motion. Docket 84, Ex. A. The court previously approved the use of cash collateral through November 13, 2017. Docket 95.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's rights under 11 U.S.C. § 363. 11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest."

The proposed budget includes labor, accounting, advertising, maintenance,

insurance, technology, and miscellaneous expenses. See Docket 84, Ex. A.

The proposed use of cash collateral will preserve the going concern of the debtor's businesses, allowing the debtor to continue operating them, thus permitting realization of income through retail transactions. This is in the best interest of the estate and the creditors.

There are five creditors that hold security interests against the debtor's cash collateral: (1) ByLine Bank, successor by merger of Ridgestone Bank, SBA loan; (2) ByLine Bank, successor by merger of Ridgestone Bank, SBA construction loan; (3) ESBF California, L.L.C., factoring loan; (4) Global Merchant Cash, factoring loan; (5) YellowStone Capital West L.L.C., factoring loan; and (6) World Global Financing, factoring loan.

The debtor proposes to remit to ByLine Bank monthly adequate protection payments of interest only payment on both notes in the total amount of $11,032.47 no later than the 15th of each month, such payments to be retroactive to the petition date.

As for the remaining factoring loans, the debtor is currently not seeking authorization to pay any adequate protection payments. Rather, all excess funds will be set-aside in a DIP account, which the debtor will not use without further permission from creditors or the court. The debtor asserts that no adequate protection payment is required because the factoring loans are adequately protected by their security interest in the debtor's cash on hand, inventory, all assets - equipment and fixtures. The aggregate value of the factoring loan debts is approximately $670,000.00. As of October 23, 2017, the debtor's cash, cash equivalents, and financial assets from operating the business has increased from $278,416.99 to $740,868.76 ($525,936.43 represents assets held in Debtor-in-possession bank accounts and the balance of $214,932.33 is held by First Data, a third-party merchant operator). Docket 82 at 2-3.

As further partial adequate protection for the continued use by the debtor of the cash collateral, the debtor proposes to grant continuing replacement liens in favor of the Byline Bank on the debtor's property, to the extent of his interest in cash collateral on the date of the order for relief.

Accordingly, the court will approve the debtor's use of the creditors' cash collateral, consistent with the budget proposed in the motion.

By authorizing cash collateral use, the court is not approving the compensation of professionals of the estate, even if such compensation is accounted for in the cash collateral budget.

6. 17-26125-A-11 FIRST CAPITAL RETAIL, L.L.C.
GEL-8

MOTION TO APPROVE REINSTATEMENT AND SETTLEMENT AGREEMENT 11-22-17 [152]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the chapter 7 trustee, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the debtor, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The chapter 11 debtor requests approval of a settlement agreement between the debtor on one hand and Cinnabon Franchisor SPV LLC on the other, to reinstate 14 terminated franchise agreements to operate Cinnabon locations throughout California. Prior to filing the petition, the debtor defaulted on its obligations to pay royalties and advertising contributions in addition to its remodel obligations. Since the petition date, the franchisor has informally allowed the debtor to keep operating under the franchise agreement to help facilitate the debtor's restructuring. The debtor has paid all the royalties and advertising contributions due for the period from the petition date through October 31, 2017. The franchisor now requires a more formal agreement.

The agreement provides that the franchisor will reinstate the terminated franchise agreements, so as to permit the debtor to continue operating its Cinnabon locations, in exchange for the debtor's agreement to (I) cure existing payment defaults in the amount of $330,784.07 on a reasonable schedule, (ii) cure performance defaults (including the remodeling obligations), and (iii) grant the franchisor a general release. The agreement does not require the debtor to assume the leases.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. First, the agreement allows the debtor to continue operating the franchise locations, which in turn will permit the debtor to propose a plan of reorganization, rather than one of liquidation. Second, the agreement restructures the required remodel schedule of each franchise location to a reasonable time frame with the first remodels occurring in June of 2018. Third, the agreement resolves issues of the debtor transferring the ownership of the franchise entity without the consent of the franchisor prior to the petition date, when the debtor's membership interest was sold to the new owner, Rameshwar Prasad, on February 23, 2017.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

7. 10-53041-A-7 MOMOTAKA/DEBORAH SAIYO — OBJECTION TO CLAIM
DRE-1
VS. HUI-MING CHANG — 8-21-17 [63]

Tentative Ruling: The objection will be overruled without prejudice.

The debtors object to the February 24, 2017 $38 million general unsecured proof of claim of Hui-Ming Chang, POC 1, arguing that the claim, even if meritorious, arose after the December 17, 2010 filing of this case. Even assuming it is valid, it is a post-petition claim and thus ineligible to recover from this estate.

The debtors filed this chapter 7 case on December 17, 2010. The trustee issued a report of no distribution on February 7, 2011. The court entered the debtors' discharge on March 28, 2011. The case was closed on April 1, 2011.

On July 28, 2016, the debtors moved to reopen the case in order to amend their schedules to schedule an asset and an exemption of the newly disclosed asset. Dockets 27 & 28. The case was reopened on July 28, 2016. Docket 30. The new asset was described as "[p]otential inheritance in Taiwan property." Docket 60. The debtors exempted $20,000 in the asset pursuant to Cal. Civ. Proc. Code § 703.140(b)(5). Id. The court appointed a chapter 7 trustee in the case on October 26, 2016. Dockets 53 & 58. The trustee issued a notice of assets on November 29, 2016. The claimant filed the subject proof of claim on February 24, 2017. POC Docket 1. The debtors filed this objection on August 21, 2017. Docket 63. The claimant filed an opposition to the objection on November 27, 2017 requesting that the court permissively abstain from adjudicating the objection to claim due to pending litigation in the District Court. Docket 72.

The objection will be overruled. The court is unwilling to entertain this objection unless and until the trustee first has the opportunity to investigate the debtors' newly scheduled asset and the subject proof of claim. Only if the trustee declines to object to the proof of claim will the debtors have standing to object to it.

8. 15-27579-A-7 SITHON CHAN — MOTION FOR SUMMARY JUDGMENT
16-2203 MJH-1
CHAN V. STATE OF CALIFORNIA FRANCHISE TAX BOARD — 9-15-17 [14]

Tentative Ruling: The motion will be denied.

The plaintiff, Sithon Chan, the debtor in the underlying chapter 7 case, seeks partial summary judgment concerning the dischargeability of a disputed debt owed to the defendant, State of California Tax Board. Docket 14 at 2.

The motion indicates that the plaintiff is not seeking summary judgment concerning his liability for the 2012 tax year. Id. The plaintiff's reply brief, however, requests judgment that the plaintiff's liability for 2012 taxes is disargeable. Docket 30 at 2.

The plaintiff filed the underlying chapter 7 case on September 27, 2016. The

defendant has claimed $128,274.74 plus accrued interest and penalties for 1995 taxes, $62,230.05 plus accrued interest and penalties for 1996 taxes, and $1,100 plus accrued interest and penalties for 2012.

On September 27, 2016, the plaintiff filed this adversary proceeding seeking to discharge California state income tax liability for the 1995, 1996, and 2012 tax years. Docket 1.

11 U.S.C. Code § 523 - Exceptions to Discharge, provides as follows:

(a) A discharge under section 727, 1442, 1228(a), or 1328(b) of this title does not discharge an individual debtor from any debt–

(1) for a tax or a customs duty–

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required–

(I) was not filed or given: or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition: or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

Summary judgment is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no genuine issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323.

The motion will be denied.

The plaintiff has not met his burden and established that no there is no genuine issue of material fact as to whether he filed state tax returns for the 1995 and 1996 tax years.

First, the plaintiff relies on a single piece of evidence to establish that he filed his state tax returns for the 1995 and 1996 tax years. This evidence consists of a 2005 Franchise Tax Board record that includes a description under the account history section stating as follows:

Account History: 1989 to 1997 returns filed. Non-liable spouse stated in 1998 taxpayer left state to get away from his tax problems but has since returned. Spoke with taxpayer on 02/2014. Understood he needs to file but has never did.

Docket 16, Ex. E.

This record does not establish that the plaintiff filed state tax returns for the 1995 and 1996 tax years. Rather, the brevity and informality of the description under account history yields multiple reasonable interpretations. For example, the plaintiff may have filed returns for some of the years from 1989 to 1997, not necessarily every year. Also, it is unclear for which tax year(s) the sentence "*Understood he needs to file but has never did*" refers to.

Second, the defendant has presented evidence that support a reasonable inference that the plaintiff did not file state tax returns for the 1995 and 1996 tax years. In his declaration in support of the opposition, Greg Heninger, a program specialist for the FTB, testifies that the FTB's records show that the plaintiff never filed a California income tax return for the 1995 and 1996 tax years. Docket 28 (Decl. of Greg Heninger) at ¶¶ 4-5, 18. Mr. Heninger explains that the current system that the FTB uses for billing and collecting personal income tax does not provide a filing date for the plaintiff's 1995 and 1996 tax returns and this indicates that the returns were never filed. Id. at ¶¶ 8, 18. The defendant has also provided copies of the reports that Mr. Heninger refers to in his declaration. See Docket 27, Ex. 1.

Third, in his verified responses to requests for admission and interrogatories propounded by the defendant, the plaintiff admits that he did not file state income tax returns in 1995 and 1996, and contends that he was not required to do so because he had no income in those years. Docket 27, Ex. 2, at 2:16-19 and 25-28, and Ex. 3 at 6:3-8 and 9-14. A matter admitted under Rule 36 of the Federal Rules of Civil Procedure, "is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." Fed. R. Civ. P. 36(b). Rule 36 is made applicable in adversary proceedings by Bankruptcy Rule 7036. The docket does not reflect that the plaintiff has moved to withdraw or amend his responses to defendant's requests for admission. The plaintiff's admission directly contradicts his position in this motion.

Based on the forgoing conflicting evidence, there is a genuine issue of material fact as to the plaintiff's state tax liability for the 1995 and 1996 tax years. The court will not enter summary judgment declaring that the debtor's liability for 1995 and 1996 taxes is dischargeable.

9. 15-27579-A-7 SITHON CHAN — STATUS CONFERENCE
16-2203 — 9-27-16 [1]
CHAN V. STATE OF CALIFORNIA
FRANCHISE TAX BOARD

Tentative Ruling: None